

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS ALVAREZ CHICAS, ALONSO VILLATORO,
MISAEAL ALEXANDER MARTINEZ CASTRO, ANGEL
MARTINEZ, EDWIN ULLOA MOREIRA and MATEO
UMAÑA individually and on behalf of all others similarly
situated,

Case No. 21-cv-09014

Plaintiffs,

- against -

KELCO CONSTRUCTION, INC., KELCO
LANDSCAPING, INC., E.L.M. GENERAL
CONSTRUCTION CORP. D/B/A KELLY'S CREW, JOHN
KELLY and JOSEPH PROVENZANO,

Defendants.

**DECLARATION OF STEVEN JOHN MOSER IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

I, Steven Jon Moser, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I represent the Plaintiffs in this action.
2. I make this declaration in opposition to the Defendants' Motion to Dismiss for failure to state a cause of action.
3. Plaintiffs served discovery requests upon Defendants on March 17, 2022 seeking, inter alia, contracts for work performed by the Defendants. On Thursday, June 2, 2022 Defendants indicated that they were still "working on preparing...responses to the discovery" requests, but indicated a good faith desire to mediate and suggested a stay. As of today, Defendants have not furnished any contracts for work performed by the Plaintiffs either in response to the original requests served on March 17, 2022 or in response to the supplemental requests served in January 2023.

4. On February 16, 2023 Plaintiffs sent an email to Defendants' counsel offering to "amend the complaint to resolve the pleading issues" and seeking to "explore the possibility of resolving [Defendants' concerns] without court intervention." Defendants stated that "[b]efore consenting to any amendment, [they would] need to see the proposed amended complaint."

5. Defendants were furnished with the proposed TAC on March 14, 2023.

6. On March 23, 2023 defendants' counsel sent an email stating:.

We have reviewed the proposed amendments. In an effort to try to extend some good will, we will agree to not contest your filing of the [third] amended complaint even though we think it is still deficient in a number of respects.

7. Plaintiffs immediately asked Defendants for clarification as to whether, in light of the proposed amendments, they intended on challenging the TAC based upon a pleading deficiency or futility. More specifically, Plaintiffs' counsel emailed defendant's counsel: It is "still not clear on whether the defendants are claiming a pleading deficiency or the lack of a cause of action. Can you be more specific?"

8. Despite Defendants' offer of "good will", they did not respond to this request, and three months later filed the instant motion to dismiss.

9. Annexed hereto are true and accurate copies of the following documents:

Exhibit 1: Relevant portions of the Complaint filed in *Henriquez v. Kelco Landscaping, Inc.*, et al., 12-cv-6233(ADS)(GRB).

Exhibit 2: Relevant portions of the *Henriquez* Answer.

Exhibit 3: Representative samples of certified payrolls from *Henriquez*

Exhibit 4: Representative examples of identification cards issued to Plaintiffs at locations where work was performed.

Exhibit 5: Excerpts from the Office of the Comptroller, City of New York § 220 Prevailing Wage Schedule

- Exhibit 6: Kelco Landscaping, Inc.'s application for home improvement license to the Suffolk County Department of Labor, Licensing and Consumer Affairs.
- Exhibit 7: Documents obtained from the New York State Insurance Fund
- Exhibit 8: Results of a search performed on the website of The Federal Motor Carrier Safety Administration, Safety and Fitness Electronic Records, for Kelco Landscaping.
- Exhibit 9: Photographs of Kelco Construction/Kelco Landscaping vehicles.
- Exhibit 10: The first and last page of the Henriquez settlement agreement.
- Exhibit 11: Kelco name and logo on Defendant's website: www.kelcoland.com.
- Exhibit 12: A letter submitted by John Kelly on behalf of Kelco Landscaping, Inc. to the NYSIF.

I declare under penalty of perjury, that the foregoing is true and correct.

Dated: July 13, 2023

/s/ Steven John Moser
Steven John Moser